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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 485

THE LONDON and OVERSEAS INSURANCE CO., *et al.*,

Petitioners,

v.

BUNGE CORPORATION, and BROOKS BANKER, as Treasurer of American Express Company,

Respondents.

BRIEF OF RESPONDENT BUNGE CORPORATION IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Preliminary Statement

This brief is submitted in opposition to the petition for a writ of certiorari by petitioners The London and Overseas Insurance Company, *et al.* ("Lloyds"). Respondent Bunge Corporation ("Bunge"), plaintiff in the lower court, brought this action against Lloyds, and Lloyds thereafter commenced a third-party action against Brooks Banker as Treasurer of American Express Company ("American Express"). As part of a settlement of claims by certain warehouse receipt holders against American Express, Bunge gave a general release to American Express. Thereafter the District Court granted a motion by American Express for summary judgment dismissing Lloyds' third-party claim, and as part of the same decision also granted summary judgment dismissing Bunge's claim against Lloyds.[1] On appeal from that decision, the Court of Appeals for

[1] 64 Civ. No. 3440 (S. D. N. Y. Dec. 14, 1967).

the Second Circuit affirmed the dismissal of Lloyds' third-party complaint but reversed the dismissal of Bunge's claim against Lloyds.[2] Lloyds now seeks a review of this decision by its petition for a writ of certiorari.

Question Presented

Insofar as the petition seeks review of the decision below as it affects Bunge's rights, the question presented is:

Whether, after an insurer has denied liability, the insured may, incident to a good faith settlement, release a third party claimed to be liable for the insured's loss, and retain its rights against the insurer for uncompensated loss, where the settlement and the resulting release occurred subsequent to the commencement of an action by the insured against the insurer, and subsequent to the impleader of the third party by the insurer pursuant to Rule 14(a) of the Federal Rules of Civil Procedure.

Statement of the Case

Bunge had insured with Lloyds certain vegetable oil which was stored in a warehouse operated by a wholly owned subsidiary of American Express. Warehouse receipts for this oil had been issued to Bunge. The oil disappeared and was never delivered to Bunge. Bunge filed a proof of claim with Lloyds which was rejected, and, accordingly, this diversity action was commenced. Bunge claimed damages in the amount of approximately $20,000,000. (4a-27a).[3] Lloyds' answer admitted the execution and delivery of the policies of insurance, but denied liability upon various grounds including non-existence of the oil at the time the insurance was placed; non-disclosure, concealment and misrepresentation in obtaining the insur-

[2] 394 F. 2d 496 (2d Cir. 1968).

[3] All references are to the appendix in the court below.

ance; that the insurance was null and void from its inception; and others. (40a-46a). Shortly after answering, Lloyds filed its third-party complaint against American Express. (47a-49a).

Both prior to and during the pendency of the present action, Bunge and numerous other warehouse receipt claimants had been negotiating with American Express concerning settlement of claims asserted against it. American Express vigorously disputed that it was in any way liable to any claimant. Bunge's claim arose out of the disappearance of the same vegetable oil which was the subject of Bunge's insurance with Lloyds and of the present action. (100a).

After the commencement of the third-party action herein, and after due notice to Lloyds, an agreement of settlement was entered into by Bunge and the other claimants, on the one hand, and American Express on the other. The terms of the settlement were that American Express would contribute approximately $60,000,000 to be divided pursuant to a certain formula among the various claimants, and, in exchange, all of the claimants, including Bunge, would release American Express from any claims arising out of the disappearance of the oil.[4] The settlement, which was to become final upon the occurrence of certain conditions, was subsequently consummated, and Bunge's release of American Express thereupon became effective. (100a-101a).

American Express then moved for summary judgment dismissing the third-party complaint. (95a). The ground of the motion was that since the third-party claim of Lloyds

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[4]Bunge's share of this settlement will be between approximately $9,000,000 and $12,500,000, depending upon the outcome of certain other litigation. Bunge has never disputed that Lloyds would be entitled to a credit for any net amount Bunge receives pursuant to the settlement with American Express. Bunge's entire net recovery from this settlement will thus inure to the benefit of Lloyds in the event of its liability to Bunge.

was concededly based upon potential subrogation—that is, it was asserted in the right of Bunge—and since Bunge had released all of its claims against American Express, the potential third-party claim of Lloyds was, as a matter of law, also released. The District Court granted this motion and dismissed the third-party claim, holding that Bunge had the power to give a release to American Express which was binding upon Lloyds, but the court on Lloyds' "oral motion" also dismissed Bunge's claim against Lloyds, holding that Bunge, having "destroyed" Lloyds' subrogation rights, had extinguished its claim against Lloyds.

On appeal, the Second Circuit affirmed the lower Court's dismissal of Lloyds' third-party complaint, but reversed the dismissal of Bunge's complaint, stating that it was "well settled" that after a denial of liability by an insurer, the insured may enter into a good faith settlement with a third party without prejudicing its rights against the insurer. Lloyds now petitions for a writ of certiorari to review the decision of the Second Circuit. It is our position that there is no basis for the granting of the writ and the petition should be denied.

Argument

The holding of the Second Circuit that the law is "well settled" that, after a denial of liability by an insurer, the insured may enter into a good faith settlement with a third party without prejudicing its rights against the insurer, is a restatement of one of the basic propositions of insurance law and is supported by every case we know of in which this issue has been faced.

The principal New York cases are *Vanguard Ins. Co.* v. *Polchlopek,* 18 N.Y.2d 376, 275 N.Y.S.2d 515, 222 N.E.2d 383 (1966); *Cardinal* v. *State,* 304 N.Y. 400, 107 N.E.2d 569 (1952), *motion to amend remittitur*

denied, 304 N.Y. 875, 109 N.E.2d 885 (1952), *cert. denied*, 345 U.S. 918 (1953); and *In re People ex. rel. Emmet (In re Empire State Sur. Co.)* 214 N.Y. 553, 108 N.E. 825 (1915). *Accord, Dinn Oil Co.* v. *Hanover Ins. Co.*, 87 Ill. App. 2d 123, 230 N.E.2d 702 (1967); *Poole* v. *William Penn Fire Ins. Co.*, 264 Ala. 62, 84 So. 2d 333 (1955); *Roberts* v. *Fireman's Ins. Co.*, 376 Pa. 99, 101 A.2d 747 (1954); *Powers* v. *Calvert Fire Ins. Co.*, 216 S. C. 309, 57 S.E.2d 638 (1950).

Other cases to the same effect are, *e. g., St. Louis Dressed Beef & Provision Co.* v. *Maryland Cas. Co.*, 201 U.S. 173 (1906); *National Sur. Corp.* v. *Rauscher, Pierce & Co.*, 369 F.2d 572 (5th Cir. 1966), *cert. denied*, 386 U.S. 1018 (1967); *American Mut. Liab. Ins. Co.* v. *Buckley & Co.*, 117 F.2d 845 (3d Cir. 1941); *Ross-Field Corp.* v. *Underwriters at Lloyd's*, 164 Cal. App. 2d 83, 330 P. 2d 432 (1958); *Thomas W. Hooley & Sons* v. *Zurich Gen. Acc. & Liab. Ins. Co.*, 235 La. 289, 103 So. 2d 449 (1958); *United States Fid. & Guar. Co.* v. *National Paving & Contracting Co.*, 228 Md. 40, 178 A.2d 872 (1962).

The petitioners suggest that the Second Circuit did not properly construe the New York law. Petitioners cite several cases which they allege support this suggestion, but none of these cases deals with the specific issues which are presented here, and none of these cases involves a holding in conflict with the principle set forth above and applied by the Second Circuit. Indeed, within the past week the New York Supreme Court relied on the very opinion of the Second Circuit below, and upon the cases cited in that opinion, in deciding a case involving substantially the precise facts of the instant case, as it arose out of the same settlement with American Express that is involved here. The Court held that the insured did not lose its rights against its insurers when it released American Express

after a denial of liability by the insurers. *Scarburgh Co.* v. *Employers' Surplus Lines Ins. Co.,* Index No. 18763/1965 (Sup. Ct. N. Y. Co. Sept. 30, 1968). There is thus no question involved concerning the intepretation of New York substantive law by the Second Circuit which would warrant a review by this Court.

The real thrust of petitioners' argument is that commencement of a third-party action under Rule 14(a) somehow changes the substantive law in one manner or another.[5] Petitioners' whole position must rest on the implied assertion that because Rule 14(a) gives them the procedural right to bring the third-party action, it thereby necessarily vests them with the substantive right to control the disposition of the insured's claims against the third party, a right which they do not otherwise have.

That neither Rule 14(a) nor any other rule enlarges or otherwise affects substantive rights is basic to the very fabric of the federal rules. The Federal Rules Enabling Act, 28 U. S. C. § 2072 (1964), plainly states:

> "The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions . . . .
>
> "Such rules shall not abridge, enlarge or modify any substantive right . . . ."

The cases have consistently interpreted the rules to reflect this. *See United States* v. *Sherwood,* 312 U. S. 584, 589-90 (1941); *Travelers Ins. Co.* v. *Busy Elec. Co.,* 294 F.2d 139

[5]Petitioners assert that commencement of the third-party action under Rule 14(a) either (i) deprived Bunge of the power to give American Express a release effective against Lloyds, or (ii) allowed Bunge the power to give such a release, but only at the cost to Bunge of also releasing Lloyds.

(5th Cir. 1961); *Smith* v. *Whitmore*, 270 F. 2d 741 (3d Cir. 1959).

Petitioners assert that the cases of *Glens Falls Indem. Co.* v. *Atlantic Building Corp.*, 199 F.2d 60 (4th Cir. 1952), and *St. Paul Fire & Marine Ins. Co.* v. *United States Lines Co.*, 258 F. 2d 374 (2d Cir. 1958), *cert. denied*, 359 U. S. 910 (1959), stand for the proposition that under Rule 14(a) a non-paying third-party plaintiff insurance company does have the substantive rights asserted here, and that the decision of the Second Circuit is therefore in conflict with these decisions. Examination of those cases reveals, however, that they stand for nothing more than the proposition that an insurance company, despite its lack of payment, does have the right to implead a third-party pursuant to Rule 14(a). The decision of the court below is entirely in accord with those cases. Neither of those cases dealt with the question of whether commencement of a third-party action under Rule 14(a) enlarges the substantive rights of the insurer, as was expressly recognized by the court below, and those cases are thus not in point.

Further, petitioners' attempt to suggest that New York substantive law is unsettled is based on the same misconception. The New York Court of Appeals, in *Krause* v. *American Guar. & Liab. Ins. Co.*, 22 N. Y. 2d 147, 292 N. Y. S. 2d 67, 239 N. E. 2d 175 (1968), faced the parallel issue under New York law as the federal courts dealt with in the *Glen Falls* and *St. Paul* cases under federal law—namely, whether a defendant insurer had any right whatsoever, prior to payment, to implead a third party under the impleader section of the New York Civil Practice Law and Rules,[6] a section which is precisely parallel in terms to Rule 14(a) of the Federal Rules of Civil Procedure. The New York Court of Appeals held that the insurer did have the procedural right

[6] C.P.L.R. § 1007.

to implead a third party. It was expressly argued to that Court that to allow impleader would alter substantive rights. While acknowledging that the question of the insured's rights against his insurer by reason of the insured's settlement and release of the third party was not before it, the Court significantly stated:

> "The assertion that the insured will be deprived of control of his claim against the alleged tort-feasor is of no merit as is the similar argument that it will delay settlements between the two. The insured is free to press on with its claim or, if no payment has been made by the insurer, settle as the insured desires. (Cf. *Ocean Acc. & Guar. Corp.* v. *Hooker Electrochem. Co.*, 240 N. Y. 37)." 22 N.Y.2d at 72, 292 N. Y. S. 2d at 72, 239 N. E. 2d at 179 (footnote omitted).

CONCLUSION

It is respectfully submitted that petitioners have failed to demonstrate any substantial reason why this court should grant a writ of certiorari in this case, and that the petition should therefore be denied.

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New York, New York
October 4, 1968

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